



June 12, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: **WC Docket No. 10-90, Connect America Fund; GN Docket No. 09-51, A National Broadband Plan for the Future; WC Docket No. 07-135, Establishing Just and Reasonable Rates for Local Exchange Service; WC Docket No. 05-337, High-Cost Universal Service Support; CC Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime; CC Docket No. 96-45, Federal-State Joint Board on Universal Service; WT Docket No. 10-208, Universal Service Reform – Mobility Fund**

Ex Parte Filing

Dear Ms. Dortch:

Alexicon Telecommunications Consulting, on behalf of the Small Company Coalition, is submitting this *ex parte* filing to showcase concerns with the current “petition for waiver” process resulting from Federal Communications Commission (“Commission”) effective rules and procedures. In November 2011, the Commission released, in FCC 11-161, its Report and Order and Further Notice of Proposed Rulemaking (i.e. “*USF/ICC Transformation Order*”). In the *Order*, specific guidelines were provided for carriers to file a petition for waiver in the event those carriers were negatively affected by the sweeping reforms enacted.

Since that time many impacted parties have filed petitions for waiver with limited, temporary, or no relief being granted. The attached summary, titled “**The Federal Communications Commission Waiver Process for Intercarrier Compensation and Universal Service Rules: A Review and Critique**”, documents the onerous, burdensome, and costly shortcomings of the [new] waiver process. It is hoped that the critique will provide industry stakeholders more visibility into the current waiver process; provide a tracking document to be used by industry representatives; and provide policymakers at the Commission with documented and empirical support to replace the current arduous waiver filing process with reasonable alternatives.

Sincerely,

Doug Kitch, Principal
Enclosure

**The Federal Communications Commission Waiver Process for
Intercarrier Compensation and Universal Service Rules:
*A Review and Critique***

Prepared by Alexicon Telecommunications Consulting
On Behalf of the Small Company Coalition

June 2013

I. Executive Summary

The Federal Communications Commission (FCC) drastically changed the present and future for small rate-of-return (RoR) regulated carriers on November 18, 2011 with the release of its landmark ICC/USF Transformation Order. Impacts on RoR were wide-ranging, from sometimes drastic changes to federal universal service fund (USF) support, to adoption of a bill and keep methodology for intercarrier compensation (ICC), complete with a complicated array of rules and procedures designed to acknowledge the importance ICC has for RoR carriers, to a substantial addition of reporting and compliance requirements. It is hardly an overstatement to say the ICC/USF Transformation Order was a world-changing event for most RoR carriers.

In order to ostensibly address some of the impacts and unintended consequences of its rule revisions, the FCC adopted what can be termed as supplemental procedures in regards to the preexisting waiver process outlined in 47 CFR §1.3.

However, the efficacy of these additions and supplements to Section 1.3 are questionable, at best, and had the effect, unintended or not, of making it difficult, and in some cases impossible, for RoR and other carriers to assert their rights and address problems in regards to the ICC/USF Transformation Order. In this paper, we will point out some of the ways in which the FCC's "new and improved" waiver process is unreasonable and contrary to the public interest.

II. Statement of Purpose

The purpose of this paper is to critically examine the processes adopted and/or supplemented in the FCC's landmark ICC/USF Transformation Order to address the possibility that some of the reforms adopted would adversely impact telecommunications carriers. These processes, which consist of a newly supplemented Section 1.3 and a method for carriers to request additional Connect America Fund (CAF) support, do not accomplish the purposes set out for them - namely, an avenue for carriers to address shortfalls in the FCC's new ICC and USF rules. Due to the shortcomings of the new processes, the FCC should not have relied on a complicated, onerous, and costly waiver system in the place of clear, reasonable, and rational rules that continue the march of broadband progress in rural areas of the United States.

III. Background

On November 18, 2011, the FCC released the ICC/USF Transformation Order¹ that, among other things, substantially changed the ICC and USF regimes for all carriers. For ICC, the FCC adopted a transition to a bill and keep regime for interstate access rates, intrastate terminating access charges, and reciprocal compensation rates, with the ultimate goal being to eliminate most forms of intercarrier compensation altogether. For USF, the FCC adopted a number of short term reforms that, in general, reduced support for a great number of rural, rate-of-return (RoR) carriers. Moreover, the changes adopted in the ICC/USF Transformation Order represented substantial changes to support mechanisms that had been in

¹ Report and Order and Further Notice of Proposed Rulemaking (FCC 11-161), WC Docket 10-90, et al, released November 18, 2011 (ICC/USF Transformation Order)

place for over a decade, and included several revisions for which the impact at the time was not known (and may still not be known).

As a result of the changes adopted in the ICC/USF Transformation Order, the FCC clearly anticipated an increased need for carriers to seek waivers of certain FCC-adopted rules. To this end, the FCC “supplemented” the current rule governing petitions for waiver, 47 CFR § 1.3, with guidance for carriers seeking relief from the rule revisions. The FCC was clear on how it expected the waiver process in a post-ICC/USF Transformation world to work:

“We do not, however, expect to grant waiver requests routinely, and caution petitioners that we intend to subject such requests to a rigorous, thorough and searching review comparable to a total company earnings review.”²

Appendix A contains a list of requirements adopted by the FCC in order to supplement its rules governing petitions for waiver. In addition, the Commission later clarified the “guidance” provided in the ICC/USF Transformation Order related to Section 1.3³ by stating that “we envision granting relief to incumbent telephone companies only in those circumstances in which the petitioner can demonstrate that consumers served by such carriers face a significant risk of losing access to a broadband-capable network that provides both voice as well as broadband today...”⁴ The Commission also attempted to reduce the burden on potential waiver applicants by (1) waiving the filing fee for petitions seeking waiver of the high cost loop support (HCLS) benchmarking rule⁵; (2) determining that the submission of geographic information, as required in the ICC/USF Transformation Order, should be viewed as illustrative examples for potential petitioners⁶; (3) concluding that it is not necessary for carriers to reaffirm that they are in compliance with existing accounting rules.⁷

In addition to supplementing its waiver rules, the FCC adopted a process pursuant to which companies can request additional support in relation to the transition of intercarrier compensation rates to a bill and keep regime.⁸ While not specifically dealing with petitions for waiver, the FCC’s newly adopted process for requesting additional support in light of changes made in the ICC/USF Transformation Order is instructive as to how the Commission expects carriers to operate in the new regulatory environment it created. Appendix B contains a summary of the Commission’s requirements and expectations in regards to requests for additional support; however, the process is plainly seen to be an onerous one:

“Specifically, a carrier can petition for a Total Cost and Earnings Review to request additional CAF ICC support and/or waiver of CAF ICC support broadband obligations. In analyzing such petitions, the Commission will consider the totality of the circumstances, to the extent permitted by law. Our analysis will consider all factors affecting a carrier and its ability to earn a return on its relevant investment, including the factors described below.”⁹

² ICC/USF Transformation Order at 540

³ Fifth Order on Reconsideration, WC Docket No. 10-90, et al., rel. November 16, 2012, at 19

⁴ Id., at 21

⁵ Id., at 24. With this waiver, the Commission claims that no petition for waiver of ICC/USF reforms will require a filing fee

⁶ Id., at 26

⁷ Id., at 27

⁸ Id., at 924-932

⁹ Id., at 926

It appears, in this context, a “total cost and earnings review” is new to the FCC’s regulatory process, and indeed replaces mechanisms that, until the release of the ICC/USF Transformation Order, had been administered by the National Exchange Carrier Association (NECA) and the Universal Service Administrative Company (USAC).¹⁰

IV. Critical Review

In order for the FCC’s new or supplemented waiver processes to function effectively and efficiently, they have to be designed and work in such a way so the possible participants are clear as to the requirements and expectations. In addition, since the Commission’s new and supplemented waiver processes are in large part aimed at smaller, rate-of-return regulated carriers¹¹, the rules should not be overly burdensome or costly. Clearly, by the very fact that the Commission saw fit to offer the new and supplemented waiver processes, it foresaw that some of the reforms adopted in the ICC/USF Transformation Order would result in unintended consequences. It would be expected that some of the impacts on specific rural carriers resulting from the substantial changes adopted in the ICC/USF Transformation Order would not and could not be foreseen. Thus, it is consistent with such a regime change that numerous waivers would be sought to address such unintended results.

As a matter of good public policy, the FCC should have aimed for a net zero change in regulatory burden between the pre- and post-ICC/USF Transformation worlds. For example, a decrease in funding may have been acceptable if it had been accompanied by a decrease in regulatory obligations or compliance requirements. Ideally, and in consideration of the increasingly competitive nature of the telecommunications marketplace, the result of the ICC/USF Transformation Order should have been a net decrease in regulatory burden. This plainly has not happened.

Instead, RoR carriers are faced with a myriad of new regulations, compliance with which takes time and resources, in addition to the new public interest obligation to provide broadband on a ubiquitous basis. As stated above, these companies are expected to operate in this new environment with lower overall support, and with little or no prospects of increasing support, outside of the FCC’s new waiver processes. The FCC, in recognizing this situation, decided that a new set of procedures would best be able to address instances when carriers were adversely impacted by the ICC and USF reforms. By extension, it is obvious that the Commission knew its reforms would impact a substantial number of carriers, or else supplementing an already existing rule governing petitions for waiver (section 1.3) and adopting a completely new “total earnings review” procedure would not have been necessary.

Section 1.3 of the Commission’s rules, entitled “suspension, amendment, or waiver of rules”, was in existence at the time of the release of the ICC/USF Transformation Order. Section 1.3 is a model of brevity:

“The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the

¹⁰ High Cost Support Mechanisms, such as High Cost Loop Support (HCLS) and Interstate Common Line Support (ICLS), pursuant to which “additional support” was requested and received by eligible companies. For interstate access charges, increased revenue requirements were recovered, for members of the NECA pools, via the Part 36/69 separations study process

¹¹ While not stated specifically as to the general waiver provisions (i.e., those adopted to supplement section 1.3), the process adopted for companies to request additional support is squarely aimed at RoR-regulated carriers.

Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”

Of course, as with many Commission rules, certain precedents have been set by which the Commission can investigate and rule petition for waiver filed under section 1.3. As stated in the ICC/USF Transformation Order:

“Generally, the Commission may waive its rules for good cause shown. See 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.”¹²

In light of the previously existing Section 1.3 waiver process, the waiver procedures adopted in the ICC/USF Transformation Order were deemed to be “guidance” for companies considering a Section 1.3 waiver request related to a reduction in USF support.¹³ Unfortunately, the guidance provided by the Commission (see Appendix A) made the once clear waiver process offered by Section 1.3 (and related precedent) unnecessarily complex and onerous, and has plainly made it more difficult for companies to address perhaps the unintended consequences resulting from the reforms adopted in the ICC/USF Transformation Order.

Predictably, the waiver process resulting from the ICC/USF Transformation Order has been anything but clear, efficient, effective, or useful to carriers. There have been numerous waivers filed subsequent to the release of the ICC/USF Transformation Order, many of which have been filed by rural LECs seeking relief from new ICC/USF rules.¹⁴ A review of these waiver filings reveals that the process is expensive, untimely, and in general not working properly. The RoR industry realized this early on and has tried to demonstrate and communicate the shortfalls of the waiver process to the Commission on many occasions, only for the Commission to again show inaction on its part.¹⁵

Perhaps most instructive are the petitions for waiver filed by three Texas companies - Border to Border Communications, Inc., Central Texas Telephone Cooperative, Inc., and Dell Telephone Cooperative (see discussion in Section V below). In each of these petitions, the companies met the substantial burden represented by the requirements as listed in Appendix A. The Bureau dismissed the petitions, via a single order, “because alternative remedies and additional support are available through a state process, we find that the Texas petitioners have not demonstrated good cause for the waiver at this

¹² ICC/USF Transformation Order, footnote 905

¹³ Fifth Order on Reconsideration, at 19

¹⁴ This paper addresses only those waivers filed in regards to carriers seeking more support or requesting waiver of certain rules that resulted in changes to ICC or USF levels. This paper excludes discussion of those waivers filed in regards to study area boundary data, or those filed by large and mid-size price cap carriers. (see discussion below, Section IV *supra*)

¹⁵ See for example the *Ex Parte Notice* filing submitted on June 25th, 2012 by NTCA, stating “The process for seeking a waiver remains quite onerous, requiring the preparation and submission of information far in excess of what is needed to evaluate whether good cause exists for grant of a waiver.”

time.”¹⁶ Although this decision raises serious questions as to the shift of responsibility to the states of a federal mandate, for purposes of the waiver discussion herein one thing is clear - the Bureau “moved the goal posts.” A review of the factors adopted by the Commission for waiver filings (Appendix A) reveals that there is nothing mentioned about seeking state relief as a prerequisite for obtaining a waiver of FCC rules. Dell perhaps says it best:

“Sadly, the Order renders any concept of a credible waiver process under the USF/ICC Transformation Order as fleeting and far off as a mirage in the desert.”¹⁷

“...the Bureau summarily dismissed the Petition by inventing an entirely new requirement-which apparently only ETCs in Texas must meet-that conditions a waiver of federal rules on the exhaustion of state administrative remedies.”¹⁸

“The Bureau is not at liberty to create new procedural requirements or impose new substantive obligations on an ETC as a condition of waiver.”¹⁹

At best, the Bureau’s Order on the Texas company petitions has it backwards - a waiver for relief from *federal* rules should exhaust federal remedies first, before seeking relief at the state level. At worst, the Bureau’s decision demonstrates that the goal posts are indeed mobile, and a petitioner will not have any rational way of knowing where the goal posts will end up.

The state of Kansas took a decidedly different approach, and one that directly conflicts with the reasons the Bureau used in dismissing the Texas company petitions. In a recent Order, the Kansas Corporation Commission addressed the issue of whether the state universal service fund should be used to offset the impacts of FCC ICC reform not addressed by the Access Recovery Charge (ARC) or CAF ICC support. In this order, the KCC explicitly stated “Accordingly, the Commission [KCC] is bound by the [Kansas] legislature’s directive that KUSF support cannot be provided to a rate of return regulated local exchange carrier to offset any loss in FUSF support.”²⁰ Thus, Kansas ETCs cannot, by operation of law and KCC order, request state USF support for reductions in federal support, and therefore would be under different criteria than ETCs operating in Texas. Whether intended or not, the Bureau’s dismissal of the Texas company petitions presents the real likelihood that ETCs operating in different states, and in relation to countless other variables, will be treated differently when asking for relief from federal rules.

While an exhaustive review of the waivers filed (as listed in Appendix C), the information provided, supplemental information requested and provided, and final dispensation would provide more detail to support the conclusion reached in this *Review and Critique*, the facts provided herein will suffice to show that the Commission’s waiver process in the post-ICC/USF Reform Transformation Order world leaves much to be desired - especially as it concerns the customers of companies that are being harmed by the Commission’s new ICC and USF rules.

¹⁶ Order, WC Docket No. 10-90 and 05-337, rel. April 30, 2013 (DA 13-965) at 1

¹⁷ Application for Review of Dell Telephone Cooperative, WC Docket No. 10-90 and 05-337, filed May 30, 2013 at 2 (Dell Application for Review)

¹⁸ Id.

¹⁹ Id., at 3

²⁰ KCC Docket No. 12-GIMT-170-GIT, May 29, 2013 Order, at 5

The Commission, as stated above, clearly knew that its ICC/USF reforms could harm rural companies' ability to serve customers:

"The waiver process we have set out will give the Commission an opportunity to use a safety net in order to ensure *consumers* aren't inadvertently harmed by our reforms."²¹

It is in recognition that rural LECs provide the vital services to such customers that the Commission has the waiver process in place. It is the rural LECs that must meet the standards for waiver contained in Section 1.3, as supplemented by the FCC in regards to ICC/USF reforms, and thus must show that harm to rural LECs directly leads to harm to rural consumers. Instead of making this process as efficient and effective as possible, it has become a nightmare scenario for many companies that have filed petitions, has oftentimes resulted in untimely decisions, and has undoubtedly caused many potential petitioners to think twice about asserting their rights under Section 1.3.

Finally, the petitions for waiver that are being reviewed and discussed are of a limited scope - those filed by RLECs and small CETCs in regards to the Commission's revised ICC and USF rules adopted in the ICC/USF Transformation Order. Excluded are those petitions filed by price cap and affiliates, and those filed in regards to the study area boundary data initially used by the FCC in the HCLS benchmarking analysis.²² The petitions filed by price cap carriers (and their affiliates) were excluded because such carriers were not in large part impacted by the ICC and USF rule changes. In the case of the study area boundary data petitions, the FCC adopted a streamlined waiver process, under Section 1.3, for impacted carriers to address issues with the data.²³ A limited review of petitions filed under the purview of this streamlined waiver process shows that, in large part, filing companies have received timely and positive relief. Eventually, the Commission adopted a more robust process for gathering study area boundary data, thus obviating the need for a streamlined waiver process.²⁴

The above discussion regarding the streamlined waiver process adopted for the initial data set used by the Commission to determine study area boundaries is instructive as to the waiver process being discussed herein. In this case, the FCC adopted a data source, one use for which was to determine study area boundaries in the context of implementation of the benchmarking rule, which was found to contain inaccuracies.²⁵ In recognition of the acknowledged problems with this data source, the Commission (1) adopted a streamlined waiver process for impacted companies to correct the data, and (2) adopted a process to gather more accurate data. In the case of study area boundary data, it was implicitly acknowledged that the cause of the problems was the data associated with a rule revision, and thus impacted companies should be provided with an expedited process to address such problems. In the case of other ICC and USF rule revisions, however, the Commission assumes such revisions, in many cases more complicated than study area boundary data, are accurate and produce only intended results. Thus, the burden of proof, in the form of the onerous "guidance" provided by the Commission, is placed squarely and solely upon the aggrieved party (the RLEC petitioner). The Commission should examine

²¹ Written statement of Commissioner Mignon L. Clyburn before the United States Senate Committee on Indian Affairs, June 7 2012, at 7 (emphasis in original)

²² See ICC/USF Transformation Order, at 1081 and footnote 2207 (discussing the use of Tele Atlas Telecommunications Suite, June 2010)

²³ Order, WC Docket Nos. 10-90 and 05-337, released April 25, 2012 (DA 12-646), at 27 (Benchmarking Order)

²⁴ Report and Order, WC Docket Nos. 10-90 and 05-337, released November 6, 2012 (DA-1277) and Order on Reconsideration, released February 26, 2013 (DA 13-282)

²⁵ Benchmarking Order at 27

these examples and reconsider the burden it is placing upon small companies who are attempting to assert their rights under Section 1.3 in regards to the revised ICC and USF rules.

V. Waivers Filed to Date

Appendix C contains a list of certain waivers filed to date. This list is limited to waivers filed by small companies seeking waiver of certain of the FCC's revised USF and ICC rules.²⁶ Of the 28 petitions filed, the FCC (mostly through the Wireline Competition Bureau's Delegated Authority) has acted on only a handful (nine as of June 3, 2013). Of those nine, three were approved for interim relief, and one was granted in part. The rest of the petitions acted upon were dismissed or denied.

A review of some of the activity after petitions for waiver are filed proves instructive. These few examples will demonstrate that the waiver process and guidelines adopted by the Commission in the ICC/USF Transformation Order is costly, time consuming, and ultimately poses a substantial risk of failure for any company filing a petition.

Border to Border Communications (Border) filed a petition for waiver on June 29, 2012 seeking relief from the Commission's \$250 total per-line cap on HCLS²⁷ and benchmarking rule that limits the recovery of certain investment and expenses through the HCLS mechanism.²⁸ Border's petition included all the information contained in the FCC's "guidance" for carriers seeking a waiver of the new ICC/USF rules. Subsequent to the filing, Border, on at least two occasions, provided additional information to the Bureau, and received an additional lengthy list of questions.²⁹ Prior to the latest request for information, Border informed the Bureau that it "was notified in November by RUS [Rural Utilities Service] that no further loan advances would be approved until the Commission acts on Border's Petition."³⁰ On April 10, 2013, Border informed the Commission that it had spent approximately \$100,000 "for the preparation and prosecution of its waiver petition."³¹ Then, on April 30, 2013, the Bureau dismissed without prejudice Border's petition, stating in essence that Border had not exhausted remedies to the issues it faced from the state jurisdiction (Texas).³²

Similar to Border, Dell Telephone Cooperative filed a petition for waiver of several of the Commission's new USF rules, including the revised corporate operations expense cap.³³ According to Dell, it spent over \$250,000 in the preparation and support of its petition.³⁴ This was spent in order to ensure the survival of a company that serves 800 customer premises.³⁵

²⁶ See Discussion in Section IV, *supra*

²⁷ 47 CFR § 54.302

²⁸ 47 CFR § 36.621(a)(5)

²⁹ See March 4, 2013 Request for Additional Information (DA 13-299), attached as Appendix D

³⁰ Border Ex Parte Filing, January 16, 2013

³¹ Border Ex Parte filing April 10, 2013

³² Order, WC Docket No. 10-90 and 05-337, rel. April 30, 2013 (DA 13-965). This order also dismissed without prejudice petitions filed by two other Texas companies - Central Texas Telephone Cooperative and Dell Telephone Cooperative

³³ See Petition for Waiver of Dell Telephone Cooperative, WC Docket No. 10-90, et al., filed June 6, 2012 (Dell Petition)

³⁴ Dell Application for Review at 2

³⁵ Dell Petition at 3

South Central Telephone Association (South Central) filed a petition for waiver of the Commission's rules relating to the \$250 total monthly per-line HCLS cap and the benchmarking rule. South Central stated that without the waiver, it would likely be in default of its RUS loan covenants, and had spent approximately \$30,000 in preparing and supporting its petition.

Lastly, and again in response to Commissioner Clyburn's testimony before the United States Senate Committee on Indian Affairs on June 7th, 2012, the Commissioner stated that there was no need to hire outside consultants or attorneys (i.e. experts) to assist companies through the waiver process. The Commissioner, when asked to explain how companies could indeed wade through complicated, onerous, and burdensome requirements in compliance with the FCC's waiver process without the assistance and advice of experts, responded that companies simply needed to "follow GAAP". The next day, in a House Natural Resources Subcommittee on Indian and Alaska Native Affairs Hearing, Al Hee with Sandwich Isles Communications (SIC) testified that to date SIC had spent approximately \$250,000.

VI. Conclusion

The waiver process afforded companies under Section 1.3 has been, on balance, an efficient and effective mechanism under which carriers can address problems caused by FCC rules. After the adoption of the ICC/USF Transformation Order and the substantial change it brought about in the Commission's high cost support and intercarrier compensation regulatory regimes, the Commission saw fit to supplement Section 1.3 and provide guidance to carriers seeking to assert rights under Section 1.3. The FCC did this in recognition that its new rules may result in unintended, and harmful, consequences to rural customers and the carriers that serve them. In other words, the Commission, in the words of Commissioner Clyburn, determined a "safety net" was necessary in order to mitigate some of these harmful consequences.

Considering that the post-ICC/USF Transformation Order waiver process has, at best, produced inadequate results, the Commission should have reconsidered and still can reconsider the rules causing the most harm (as documented in the petitions for waiver), instead of relying on an untested waiver process. To date, the waiver process has proven to be costly, onerous, and time consuming, and has lately turned out to be one with an apparently ever-changing set of requirements. From the lessons learned in this process, it will be better off in the long run if the Commission would adopt a set of sustainable, reasonable, rational, and predictable rules governing the transition to a broadband-based world instead of relying on a safety net that is not only full of holes, but that can move out from under companies at a moment's notice.

APPENDIX A - GENERAL PETITION FOR WAIVER REQUIREMENTS

- Waiver would be warranted where an ETC can demonstrate that, without additional universal service funding, its support would not be “sufficient to achieve the purposes of [section 254 of the Act]
- A carrier seeking such waiver must demonstrate that it needs additional support in order for its customers to continue receiving voice service in areas where there is no terrestrial alternative.
- We will also consider whether the specific reforms would cause a provider to default on existing loans and/or become insolvent.
- For mobile providers, we will consider as a factor specific showings regarding the impact on customers, including roaming customers, if a petitioner is the only provider of CDMA or GSM coverage in the affected area.
- Petitions for waiver must include a specific explanation of why the waiver standard is met in a particular case. Conclusory assertions that reductions in support will cause harm to the carrier or make it difficult to invest in the future will not be sufficient.
- Density characteristics of the study area or other relevant geographic area including total square miles, subscribers per square mile, road miles, subscribers per road mile, mountains, bodies of water, lack of roads, remoteness, challenges and costs associated with transporting fuel, lack of scalability per community, satellite and backhaul availability, extreme weather conditions, challenging topography, short construction season or any other characteristics that contribute to the area’s high costs.
- Information regarding existence or lack of alternative providers of voice and whether those alternative providers offer broadband.
- Specific details on the make-up of corporate operations expenses such as corporate salaries, the number of employees, the nature of any overhead expenses allocated from affiliated or parent companies, or other expenses.
- Information regarding all end user rate plans, both the standard residential rate and plans that include local calling, long distance, Internet, texting, and/or video capabilities.
- A map or maps showing (1) the area it is licensed to serve; (2) the area in which it actually provides service; (3) the area in which it is designated as a CETC; (4) the area in which it is the sole provider of mobile service; (5) location of each cell site. For the first four of these areas, the provider must also submit the number of road-miles, population, and square miles. Maps shall include roads, political boundaries, and major topographical features. Any areas, places, or natural features discussed in the provider’s waiver petition shall be shown on the map.
- Evidence demonstrating that it is the only provider of mobile service in a significant portion of any study area for which it seeks a waiver. A mobile provider may satisfy this evidentiary requirement by submitting industry-recognized carrier service availability data, such as American Roamer data, for all wireless providers licensed by the FCC to serve the area in question. If a mobile provider claims to be the sole provider in an area where an industry-recognized carrier service availability data indicates the presence of other service, then it must support its claim with the results of drive tests throughout the area in question. In the parts of Alaska or other areas where drive testing is not feasible, a mobile provider may offer a statistically significant number of tests in the vicinity of locations covered. Moreover, equipment to conduct the testing can be transported by off-road vehicles, such as snow-mobles or other vehicles appropriate to local conditions. Testing must examine a statistically meaningful number of call attempts (originations) and be conducted in a manner consistent with industry best practices. Waiver petitioners that submit test results must fully describe the testing methodology, including but not limited to the test’s geographic scope, sampling method, and test set-up (equipment models, configuration, etc.). Test results must be submitted for the waiver petitioner’s own network and for all carriers that the industry-recognized carrier service availability data shows to be serving the area in which the petitioner claims to be the only provider of mobile service.
- Revenue and expense data for each cell site for the three most recent fiscal years. Revenues shall be broken out by source: end user revenues, roaming revenues, other revenues derived from facilities supported by USF, all other revenues. Expenses shall be categorized: expenses that are directly attributable to a specific cell site, network expenses allocated among all sites, overhead expenses allocated among sites. Submissions must include descriptions the manner in which shared or common costs and corporate overheads are allocated to specific cell sites. To the extent that a mobile provider makes arguments in its waiver petition based on the profitability of specific cell sites, petitioner must explain why its cost allocation methodology is reasonable.
- Projected revenues and expenses, on cell-site basis, for 5 years, with and without the waiver it seeks. In developing revenue and expense projections, petitioner should assume that it is required to serve those areas in

APPENDIX A - GENERAL PETITION FOR WAIVER REQUIREMENTS

which it is the sole provider for the entire five years and that it is required to fulfill all of its obligations as an ETC through December 2013.

- A list of services other than voice telephone services provided over the universal service supported plant, e.g., video or Internet, and the percentage of the study area's telephone subscribers that take these additional services.
- Audited financial statements and notes to the financial statements, if available, and otherwise unaudited financial statements for the most recent three fiscal years. Specifically, the cash flow statement, income statement and balance sheets. Such statements shall include information regarding costs and revenues associated with unregulated operations, e.g., video or Internet.
- Information regarding outstanding loans, including lender, loan terms, and any current discussions regarding restructuring of such loans.
- Identification of the specific facilities that will be taken out of service, such as specific cell towers for a mobile provider, absent grant of the requested waiver.
- For Tribal lands and insular areas, any additional information about the operating conditions, economic conditions, or other reasons warranting relief based on the unique characteristics of those communities.

APPENDIX B -REQUESTS FOR ADDITIONAL SUPPORT

1. Specifically, a carrier can petition for a Total Cost and Earnings Review to request additional CAF ICC support and/or waiver of CAF ICC support broadband obligations. In analyzing such petitions, the Commission will consider the totality of the circumstances, to the extent permitted by law. Our analysis will consider all factors affecting a carrier and its ability to earn a return on its relevant investment, including the factors described below. As a result of this analysis of costs and revenues, the Commission will be able to determine the constitutionally required return and will not be bound by any return historically used in rate-setting nor any specific return resulting from the intercarrier compensation recovery mechanism adopted in this Order, or possible rate represetion as discussed in the FNPRM.

2. As we seek to protect consumers from undue rate increases or increases in contributions to USF, we will conduct the most comprehensive review of any requests for additional support allowed by law. Our recovery mechanism goes beyond what might strictly be required by the constitutional takings principles underlying historical Commission regulations. Therefore, although our standard recovery mechanism does not seek to precisely quantify and address all considerations relevant to resolution of a takings claim, carriers will need to address these considerations to the extent that they seek to avail themselves of the Total Cost and Earnings Review procedure based on a claim that recovery is legally insufficient.

3. *Revenues Derived from Other Regulated Services Provided Over the Local Network.* We agree with those who argue that it is appropriate for the Commission to consider the implications of services other than switched access that are provided using supported facilities, to the extent constitutionally permitted. Notwithstanding our intercarrier compensation reform, carriers will continue to receive revenues from other uses of the local network. For example, although the reforms adopted in this Order will bring many intercarrier compensation rates into a bill-and-keep framework, other intercarrier compensation rates will be subject to minimal—or no—reforms at this time. Consequently, incumbent LECs will continue to collect intercarrier compensation for originating access and dedicated transport, providing continued revenue flows—including the underlying implicit subsidies—from those sources during the transition outlined in this Order, although we have determined that such rates ultimately will reach bill-and-keep as well. Carriers acknowledge that the subsidies in these remaining intercarrier compensation rates are used for investment in their network to provide regulated services such as special access service. In addition, there was debate in the record regarding whether, and how, to consider special access revenues in this regard. At this time we do not prescribe general rules considering such revenue, but, as with other services that rely on the local network, we will consider such earnings and may reconsider this decision if warranted upon conclusion of the Commission’s ongoing special access proceeding.

4. *Productivity Gains.* As discussed above, although incentive regulation commonly involves sharing the benefits of productivity gains between carriers and ratepayers, such a mechanism has not been in place for many years. Our standard recovery mechanism adopts a 10 percent reduction in *CALLS* price cap incumbent LECs’ baseline revenues, initially for *CALLS* price cap study areas, and after five years for non-*CALLS* price cap study areas to reflect this. However, because we believe that is a conservative approach, we find it appropriate to consider efficiency gains for particular price cap carriers on an individual basis in our Total Cost and Earnings Review, as well.

5. *LEC Cost Savings and Increased Revenue.* Currently, carriers are frequently embroiled in costly litigation over payment, jurisdiction, and type of traffic. The reforms we adopt today should substantially reduce such disputes, and we anticipate that comprehensive intercarrier compensation reform will further reduce carriers’ costs of administering intercarrier compensation. Likewise, our actions regarding phantom traffic and intercarrier compensation for VoIP traffic may increase the proportion of traffic for which intercarrier compensation can be collected. Finally, we note that our reforms should result in expense savings in other lines of business, such as the provision of long distance services. Although we do not adopt a “net revenues” approach as part of our standard recovery mechanism, in appropriate circumstances we believe an analysis of intercarrier expenses could be warranted in the examination of an individual carrier’s claim under the more fact- and carrier-specific Total Costs and Earnings Review mechanism. We will consider these factors to the extent legally permissible, including but not limited to the following categories:

- *Revenue for Exchanging VoIP Traffic.* A number of carriers have alleged that they are not receiving compensation for exchanging VoIP traffic. In this Order we adopt rules clarifying the obligation of VoIP traffic

APPENDIX B -REQUESTS FOR ADDITIONAL SUPPORT

to pay intercarrier compensation charges during the transition to bill and keep. The decisions we adopt today will provide LECs, including incumbent LECs, with more certain revenue throughout the transition, and will also allow them to avoid the litigation expense associated with attempts to collect access charges for VoIP traffic.

- *Reduced Phantom Traffic.* Similarly, the rules adopted in this Order will enable carriers to identify and bill for phantom traffic. These rules thus should enable carriers to collect intercarrier compensation charges throughout the transition that they are not currently able to collect. We also anticipate that incumbent LECs will be able to reduce administrative and litigation costs associated with such traffic.
- *Other Reduced Litigation Costs and Administrative Expenses.* In addition to reduced litigation costs and administrative expense associated with VoIP and phantom traffic as a result of the reforms we adopt in this Order, the record indicates that carriers will benefit more generally from the clarity and relative simplicity of the rules we adopt today. We anticipate that this will be reflected in additional savings in litigation and administration costs.
- *Other Services Provided Over the Local Network.* In addition to regulated services provided over the local network, many carriers also provide unregulated services, such as broadband and video. Although parties have identified some uncertainty regarding the Commission's ability to consider revenues from such services in calculating a carrier's return on investment in the local network, the Commission will, at a minimum, carefully scrutinize the allocation of costs associated with such services. As one commenter states, "[i]t simply no longer makes any sense (if it ever did) for the agency to allow rural carriers to spend as much as they can on their networks, earning a rate of return on these historical costs while only considering the small sliver of regulated local telephony revenues earned using these USF subsidized networks."

6. We note that some carriers argued that the Commission should not rely on revenue from unregulated services to offset a carrier's defined eligible revenue, but that if it did, it should only use net unregulated revenue, considering both the costs and revenues from those services. In addition, although there are a range of possible approaches for allocating many types of costs, a number of commenters recognized that historical accounting underlying intercarrier compensation rates and other charges fail to reflect the marketplace reality of the number and types of services provided over the local network. For example, the record revealed concerns about the extent to which loop costs have been allocated to regulated services such as voice telephone service versus services such as broadband Internet access service. Consequently, we will give appropriate consideration to these services as part of the Total Cost and Earnings Review, including an analysis of both the revenue generated by such other services and whether the cost of such services, both regulated and unregulated, have been properly allocated.

7. *Cost Allocation.* The *USF/ICC Transformation NPRM* sought comment on the implications of the jurisdictional separations process, including ongoing reform efforts, on intercarrier compensation reforms. The jurisdictional separations process, which has been frozen for some time, is currently the subject of a referral to the Separations Joint Board. Any carrier seeking additional recovery will be required to conduct a separations study to demonstrate the current use of its facilities. Although this is a burdensome requirement, it is not unduly so given the importance of protecting consumers and the universal service fund.

(Source: ICC/USF Transformation Order, ¶ 926-932, footnotes omitted)

Company	Date Filed	Subject	Result
Sandwich Isles Communications, Inc.	12/30/2011	\$250 Per Line limit	Denied 5/10/2013
Allband Communciations Cooperative	2/3/2012	\$250 Per Line limit	Grant part, Dismiss in Part, Dismiss as Moot in Part 7/25/2012; Allband filed PFR 8/24/2012
Big Bend Telephone Company, Inc.	2/6/2012	\$250 Per line limit; Corporate operations expense cap; Benchmarking rule	
Windy City Cellular, LLC	4/3/2012	CETC Support Phase Down	FCC approved interim relief 6/12/2012
Accipiter Communications, Inc.	4/18/2012	\$250 Per Line limit; Benchmarking rule	Approved limited, interim relief 12/20/2012; granted 1/30/2013
Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility	5/22/2012	\$250 Per Line limit	
Dell Telephone Cooperative	6/6/2012	\$250 Per line limit; Corporate operations expense cap; Benchmarking rule	Dismissed 4/30/2013; Dell filed PFR 5/30/2013
Border to Border Communcations, Inc.	6/29/2012	\$250 Per Line limit; Benchmarking rule	Dismissed 4/30/2013
TDS Telecommunications Corporation	8/9/2012	ICC Base Period Revenues (Halo Wireless)	
Matanuska Telephone Association	8/28/2012	Benchmarking Rule	
Central Texas Telephone Cooperative, Inc.	9/4/2012	Benchmarking Rule	Dismissed 4/30/2013
Cordova Wireless Communications, Inc.	10/1/2012	CETC Support Phase Down	Denied 1/14/2013
Emery Telcom	10/26/2012	ICC Base Period Revenues	
Cimarron, Cross, and Pottawatomie Telephone Companies	11/16/2012	ICC Base Period Revenues	
South Park, LLC	11/27/2012	\$250 Per Line limit; Benchmarking rule	
South Central Telephone Association	12/6/2012	\$250 Per Line limit; Benchmarking rule	
West Kentucky and Tennessee Telecommunications Cooperative	12/19/2012	ICC Base Period Revenues	
North Central Telephone Cooperative, Inc.	12/20/2012	Safety Net Additive	
FairPoint Communications Missouri, Inc.	12/26/2012	Local residential rate floor reporting	
Steelville Telephone Exchange, Inc.	12/31/2012	Local residential rate floor reporting	
Yukon Waltz Telephone Company	1/11/2013	ICC Base Period Revenues	
West Virginia Rural Companies (4 companies)	2/5/2013	Rate comparability reporting; Rate floor	
Smart City Telecom	3/27/2013	ICC Base Period revenues	
Laurel Highland and Yukon Waltz Telephone Companies	4/12/2013	Frozen interstate revenue requirement	
Matanuska Telephone Association	5/9/2013	Benchmarking Rule - Alaska capex coefficient	
Midstate Telephone Company	5/9/2013	ICC Base Period revenues	
Arthur Mutual Telephone Company	5/13/2013	ICC Base Period revenues	
Adak Eagle Enterprises, LLC d/b/a Adak Telephone Utility	5/31/2013	ICC Base Period revenues	

FCC Waiver Process - Review and Critique
June 2013

Appendix D

Request of the Wireline Competition Bureau to Border to Border
Communications



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

DA 13-299

March 4, 2013

David Cosson, Esq.
2154 Wisconsin Ave., N.W.
Washington, D.C. 20007

Re: Petition of Border to Border Communications, Inc. for Waiver of Section 54.302 and the Framework to Limit Reimbursable Capital and Operating Expenses for the Purpose of Determining High Cost Support, WC Docket No. 10-90 and WT Docket No. 10-208

Dear Mr. Cosson:

On June 29, 2012, Border to Border Communications, Inc. ("Border") filed a petition for waiver of: (1) section 54.302 of the Commission's rules, which establishes a total limit on high-cost universal service support of \$250 per line per month; and (2) section 36.621(a)(5) of the Commission's rules, which limits reimbursable capital and operating expenses for high-cost loop support (HCLS).¹

The Wireline Competition Bureau (Bureau) has reviewed the information provided by Border. Based on our review of the information already provided, the Bureau now requests additional information.² This additional information is necessary for the Bureau to determine whether there is good cause to grant the requested waivers.

¹ Border to Border Communications, Inc., Petition for Waiver of Section 54.302 and the Framework to Limit Reimbursable Capital and Operating Expenses for the Purpose of Determining High Cost Support, WC Docket No. 10-90 and WT Docket No. 10-208 (filed June 29, 2012); 47 C.F.R. §§ 36.621(a)(4)-(5), 54.302. *See also Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011); *Connect America Fund; High-Cost Universal Service Support*, WC Docket Nos. 10-90 and 05-337, Order, 27 FCC Rcd 4235 (Wireline Comp. Bur. 2012) (adopting methodology to limit reimbursable capital and operating expenses for HCLS).

² *See USF/ICC Transformation Order*, 26 FCC Rcd at 17839-42, paras. 539-43 (petitioners seeking waivers shall provide any additional information requested by Commission staff).

The questions set forth below request additional details and clarifications. For example, we seek additional details on payments to affiliates, management agreements and dividend payments. The Bureau needs to better understand Border's operations in order to fully evaluate its waiver request.

Please provide full and complete responses to the following requests and questions:

1. Provide the names, positions, and responsibilities of the individuals compensated under the January 23, 2004 Engineering Service Agreement with TRC Engineering for 2010, 2011 and 2012. For each individual, provide his or her hourly billable rate, the number of hours billed in total by TRC Engineering to Border, the total amount billed to Border, and a brief description of the activities or projects by the number of hours billed.
2. For TRC Engineering, as well as any other of Border's affiliated entities, provide the names of the affiliated entities providing services to Border, the ownership of each affiliated entity, a description of the services provided to Border, and the amounts paid to each affiliated entity for each of the last three years.
3. Provide a copy of Border's bylaws, if any, describing how dividend distributions were determined for 2010, 2011, and 2012. If no bylaws are applicable, provide copies of meeting minutes or other documents describing how dividend distributions were determined for the years above.
4. Provide a description of Border's wireline network, or illustrative network diagram, describing its architecture (e.g., core network, fiber to the premises architecture); number of route miles; number of fiber miles; and prevalent network equipment used. Include a similarly detailed description of Border's 700 MHz radio network.
5. Is the only function of Border's 700 MHz radio network to provide Internet connectivity? What does Border charge end users for services on this network? What percentage of Border's customers is served by both Border's wireline network and Border's 700 MHz wireless network?
6. Provide the financial and operating reports for the most recent four quarters that Border has also submitted to the Rural Utilities Service (RUS).
7. Provide Border's cash balances at the end of the month for the most recent three months.
8. We understand that the State of Texas has enacted a statute that requires the Public Utility Commission of Texas (Texas PUC) to "implement a mechanism to replace the reasonably projected change in revenue caused by a Federal Communications Commission order, rule, or policy." TEX. UTIL. CODE ANN. § 56.025 (c) (West 2005). We understand that Border filed a petition with the Texas PUC on February 5th, 2013 requesting relief pursuant to this statute. Describe the applicability of this statute and its implementation by the Texas PUC as it affects Border. Also estimate the impact on Border's revenues of receiving relief as requested in its petition with the Texas PUC.
9. Provide written permission to allow staff of the Federal Communications Commission to obtain from RUS information, analyses, and communications submitted by Border to

RUS; to obtain information, analyses and communications regarding Border that are in possession of RUS; and to discuss such information with staff of RUS.

If you have any questions, please call Joseph Sorresso at (202) 418-7431.

Sincerely,

Julie A. Veach
Chief, Wireline Competition Bureau

cc: Herman C. Roark, Jr.
President
Border to Border Communications, Inc.
718 Alpine Drive
Kerrville, Texas 78028